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Opinion following remand

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. HAROLD WAYNE TAYLOR, Defendant and Appellant.	A095412 (Mendocino County Super. Ct. No. SCUK-CRCR-00-37366-02)

I. INTRODUCTION

Appellant Harold Wayne Taylor killed Patty Fansler and the 11 to 13 week-old fetus she was carrying. He did not know Ms. Fansler was pregnant, nor was her pregnancy apparent. This court concluded that such facts did not support an inference of implied malice sufficient to sustain a second degree fetal murder conviction. Thus we reversed that conviction for insufficient evidence. The Supreme Court reversed our judgment on that count. (*People v. Taylor* (2004) 32 Cal.4th 863, 865.) On remand we address the vindictive prosecution issue left unresolved the first time around as well as appellant's new argument that the admission of Ms. Fansler's statement to a deputy sheriff runs afoul of the confrontation clause analysis developed in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354] (*Crawford*), decided after the trial below. Finding no error, we

affirm the second degree fetal murder conviction as well as the conviction of second degree murder of Ms. Fansler.[1]

II. DISCUSSION

A. *Vindictive Prosecution*

Appellant maintains that the trial court erred to his prejudice in denying his motion to dismiss the fetal murder count for vindictive pretrial charging. Appellant has not met his burden of showing vindictive prosecution.

1. *Background*

The initial complaint charging appellant with Ms. Fansler's murder was filed on March 11, 1999. The next month the district attorney informed defense counsel of the People's intention to proceed against appellant by way of a specially impaneled grand jury. The district attorney filed an amended complaint in August 1999, alleging a special circumstance of burglary. At that time the case was also set for a preliminary hearing which was continued to February 24, 2000.

Nevertheless the district attorney decided to proceed by way of indictment. Appellant filed a writ petition challenging the indictment. We issued an alternative writ indicating the trial court should have dismissed the indictment. Thereafter the trial court entered a dismissal of the original complaint.

A new deputy district attorney, Richard Martin, was assigned to the case. After reviewing the file, Martin elected to add a fetal murder charge. Appellant moved to dismiss, arguing that the facts showed actual pretrial vindictiveness. He maintained that waiting a year to add the fetal murder charge—after the defense obtained a dismissal of the grand jury indictment, refused to enter a plea and insisted

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[1] The Supreme Court's limited review in this case left undisturbed this court's decision on all issues affecting our initial disposition affirming the judgment as to the second degree murder of Ms. Fansler. (Cal. Const., art. VI, § 12, subd. (c); Cal. Rules of Court, rule 29(a)(1); see *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 772-773; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2004) ¶ 13.6, pp. 13-1 to 13-2.) Our decision today on appellant's claim of *Crawford* error does not change that result and therefore we again affirm that judgment.

on a preliminary hearing—demonstrated the necessary retaliation for exercising his constitutional rights.

The trial court conducted an evidentiary hearing. Deputy District Attorney Myron Sawicki testified that he was originally assigned to the case and was responsible for filing the initial charges. He was aware of the results of the autopsy at that time and thus knew about the fetus. However, he did not file a murder charge with respect to the fetus. Relying on his preexisting knowledge of case law decided prior to *People v. Davis* (1994) 7 Cal.4th 797 and undertaking no further research, he thought "we had to establish viability in order to have a chargeable death with a fetus." Sawicki was "familiar with those pre-Davis line of cases through [his] 17 years as a prosecutor."

Deputy District Attorney Martin brought *Davis* to Sawicki's attention when Martin was assigned to the case. Martin submitted a declaration attesting that he decided to add the fetal murder charge after confirming with the pathologist that the fetus was postembryonic. Martin indicated his charging decision was not based on vindictive purposes.

The trial court denied the motion: "I think, at best, I can say at this point, based on everything before the court, that certainly there may have been negligence on the part of the district attorney's office. Certainly, in a case as serious as this, you would think one would at least make sure that they were correct on the law before they acted. But I don't find it rises, at this juncture, to an intentional act on their part for purposes of increasing the punishment on Mr. Taylor for exercising a statutory or constitutional right, and your motion is denied."

2. *Legal Framework; Analysis*

It is a fundamental due process principle that the state may not punish a defendant for exercising a protected statutory or constitutional right. (*United States v. Goodwin* (1982) 457 U.S. 368, 372-373; *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 369, 374 fn. 6.) This prohibition against vindictive prosecution had its genesis in cases where the state took postconviction action in response to a

defendant's exercise of statutory rights. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 725; see *Blackledge v. Perry* (1974) 417 U.S. 21, 28-29.) The underlying rationale is that a defendant should be free to exercise appeal rights or seek a trial de novo without fear that the state will retaliate by " 'upping the ante.' " (*People v. Bracey* (1994) 21 Cal.App.4th 1532, 1543.)

The *Goodwin* court explained that in certain cases in which action detrimental to defendant had been taken *after* defendant exercised a legal right, the high court had found it necessary to apply a presumption of improper vindictive motive. (*United States v. Goodwin*, *supra*, 457 U.S. at pp. 372-373.) However, the court admonished caution in applying such a presumption in the pretrial context: "At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision." (*Id*. at p. 381.)

Absent the presumption, a claim of prosecutorial vindictiveness requires objective evidence that the charging decision was motivated by a desire to punish the defendant for undertaking something that the law allowed him or her to do. (*United States v. Goodwin*, *supra*, 457 U.S. at p. 384; *People v. Bracey*, *supra*, 21 Cal.App.4th at p. 1549.)

Appellant claims that he made a proper objective showing, pointing to the timing of the late amendment coupled with what he states was an implausible explanation offered by the prosecution. Appellant neglects to note the facts that defeat this theory. First and most significantly, the fetal murder count was added shortly after a new attorney was assigned to the case. Martin conducted research on fetal murder instead of relying on his existing understanding of the law. The trial

court concluded that while the original attorney was probably negligent in not performing the requisite research, the new charge was not retaliatory. Substantial evidence supports this conclusion.

Appellant finds the prosecution's explanation inherently implausible. The trial court judged the credibility of the explanation and concluded otherwise. Certainly we do not find it implausible that a veteran civil servant might opt to forgo additional research, relying instead on his or her experience and existing understanding of the law. This is not a good way to approach one's job but it is possible, it happens and therefore it is plausible.

B. *Applicability of Crawford*

Appellant also asserts *Crawford* error in the admission of Ms. Fansler's statements to a deputy sheriff describing two tailgating incidents.[2] The court ultimately instructed the jury that the incidents could be considered as domestic violence propensity evidence under Evidence Code section 1109.

In *Crawford*, the defendant stabbed a man who allegedly tried to rape his wife. The wife did not testify at trial, asserting the marital privilege. The state introduced the wife's tape-recorded statement to the police describing the stabbing as evidence that the stabbing was not in self-defense, relying on *Ohio v. Roberts* (1980) 448 U.S. 56. (*Crawford*, *supra*, 541 U.S. at pp. __-___ [124 S.Ct. at pp. 1357-1358].) *Ohio v. Roberts, supra,* at page 66 held that the confrontation clause does not bar admission of the statement of an unavailable witness if that statement bears "adequate 'indicia of reliability.' "

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[2] Specifically, the deputy testified that he spoke with Ms. Fansler in the lobby of the sheriff's office. She was "upset and crying," indicating that appellant had followed her and she was scared of him. She reported two incidents of tailgating that day. After a police car turned off the highway, she increased her speed to about 75 miles per hour; appellant accelerated onto her rear. She turned off, picked up her daughters and when she merged back onto the highway, appellant was behind her again.

Overruling *Ohio v. Roberts*, the high court determined that admission of the wife's tape-recorded statement violated the confrontation clause: "Where testimonial evidence is at issue . . . , the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. . . . [¶] In this case, the State admitted [wife's] testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. . . . Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford, supra,* 541 U.S. at p. ___ [124 S.Ct. at p. 1374].)

Assuming that Ms. Fansler's statements were testimonial, we agree with the Attorney General that appellant forfeited his right to assert a confrontation clause objection by killing Ms. Fansler. The court in *Crawford* recognized forfeiture by wrongdoing as an exception to its holding that confrontation is a prerequisite to admission of testimonial hearsay statements, explaining that the rule "extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability." (*Crawford*, *supra*, 541 U.S. at p. ___ [124 S.Ct. at p. 1370].) The forfeiture doctrine exemplifies the equitable principle that a defendant who renders a witness unavailable for cross-examination through his or her own wrongful act may not assert a confrontation clause violation when "competent evidence is admitted to supply the place of that which he has kept away." (*Reynolds v. United States* (1879) 98 U.S. 145, 158, cited in *Crawford*.)

Obviously, this is not a case where appellant procured the witness's unavailability by a wrongful act undertaken *for the purpose of preventing the potential witness from testifying at trial.* (See *People v. Pantoja* (2004) 122 Cal.App.4th 1, 10, fn. 2 and cases cited therein [stating in dicta that rule of forfeiture by wrongdoing is arguably inapplicable where there is no evidence that defendant killed victim for purpose of preventing witness from testifying].) To the contrary, here the predicate wrongdoing is the very crime for which defendant was tried. Our

Supreme Court recently granted review in *People v. Giles* (Dec. 22, 2004, S129852) on identical *Crawford* issues, namely whether (1) the defendant forfeited his confrontation clause claim concerning admission of the victim's prior statements about an incident of domestic violence because he killed the victim; and (2) the doctrine of forfeiture by wrongdoing applies where the predicate wrongdoing is the same as the underlying crime.

We discern no impediment to invoking the forfeiture rule in this case. Recent opinions from other jurisdictions have relied on the forfeiture doctrine in situations where the defendant is charged with the same homicide that rendered the witness unavailable, rather than with an underlying crime about which the victim had intended to testify. (See *U.S. v. Emery* (8th Cir. 1999) 186 F.3d 921, 926; *People v. Moore* (Colo.App. 2004, 01CA1760) ___ P.3d ___, ___ [2004 WL 1690247, *4]; *State v. Meeks* (Kan. 2004) 88 P.3d 789, 794.)

Meeks is instructive. There, the defendant shot the victim following a fight. The responding police officer asked the victim who shot him. The victim answered, " 'Meeks shot me.' " (*State v. Meeks*, *supra*, 88 P.3d at p. 792.) The Kansas Supreme Court held that defendant Meeks forfeited his right to confrontation by killing the witness. (*Id*. at pp. 793-794) Noting that prior precedent involved a different fact pattern, the court went on to quote from an amicus brief that addressed the specific situation at issue: " ' If the trial court determines as a threshold matter that the reason the victim cannot testify at trial is that the accused murdered her, then the accused should be deemed to have forfeited the confrontation right, *even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable*. . . . [B]ootstrapping does not pose a genuine problem.' " (*Id*. at p. 794.)

We agree with the reasoning in *Meeks*. The rationale for the forfeiture by wrongdoing doctrine is pertinent whether or not the defendant specifically intended to prevent the witness from testifying when he or she committed the act that rendered the witness unavailable at trial. In other words, equitable principles are offended by

a defendant's attempts to exclude damaging hearsay statements whether or not such statements were made by a victim for whose murder defendant is on trial, or by a victim who defendant murdered to prevent from testifying about an underlying crime.

Here the trial court did not make a threshold determination that the reason Ms. Fansler could not testify is that appellant killed her. We need not decide if the degree of proof necessary for the trial court to make this preliminary factual determination is a preponderance of the evidence (Evid. Code, § 115) or a standard of clear and convincing evidence.[3] There is clear and convincing evidence that appellant killed Ms. Fansler. He claimed at trial that the shooting was accidental. It is inconceivable that a rational trier of fact would have accepted this theory, given the prior threats to Ms. Fansler and others; Ms. Fansler's fear of him; the car chases; weapon preparation; the ruse in gaining entrance to Ms. Fansler's apartment prior to the killing, and the like. Appellant has forfeited his confrontation clause rights.

III. DISPOSITION

We affirm the judgments of conviction of second degree fetal murder and the second degree murder of Ms. Fansler.

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Reardon, J.

We concur:

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Kay, P.J.

_____
Rivera, J.

[3] The court in *King v. Superior Court* (2003) 107 Cal.App.4th 929, 949 applied the clear and convincing evidence where the defendant, through misconduct, was alleged to have forfeited his Sixth Amendment right to appointed counsel.